

IN THE CIRCUIT COURT OF THE  
SECOND JUDICIAL CIRCUIT IN AND  
FOR LEON COUNTY, FLORIDA.

CASE NO. 2019 CA 001108

BENJAMIN BROGDON and LYNDA )  
BROGDON )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
REFRESH CANOPY COVE, INC. )  
 )  
Defendant. )  
 )

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**COMPLAINT**

Plaintiffs, Benjamin Brogdon and Lynda Brogdon, hereby sue defendant Refresh Canopy Cove, Inc.), and allege as follows:

1. This is an action by Plaintiffs to recover \$1,000,000 held in escrow to which Defendant has laid wrongful claim. Plaintiff Lynda Brogdon was a sole proprietor doing business as Health Management Institute (“HMI”). HMI operated Canopy Cove Eating Disorder Treatment Center (the “Treatment Center”), which provided therapy to individuals suffering from eating disorders. HMI operated the Treatment Center on property in Leon County that was owned jointly by the Plaintiffs.

2. Defendant Refresh Canopy Cove, Inc., is a Florida corporation, the principal place of business for which is located in Leon County, Florida, where it has and keeps an office for transaction of its customary business.

3. Venue is appropriate in this Court pursuant to Section 47.011 and 47.051, Florida Statutes, because the Defendant corporation has, and usually keeps, an office for transaction of its customary business in Leon County, and because the cause of action accrued in Leon County.

4. This Court has jurisdiction over this case pursuant to Sections 26.012 and 86.011, Florida Statutes.

## **FACTUAL ALLEGATIONS**

### **A. Asset Purchase Agreement and Escrow Agreement Terms**

5. An Asset Purchase Agreement, dated December 15, 2017, was executed by Plaintiffs and Defendant, pursuant to which Plaintiffs sold certain specifically identified Acquired Assets of HMI to Defendant. [A copy of the Asset Purchase Agreement is attached hereto as **Exhibit A.**.]<sup>1</sup>

6. The Asset Purchase Agreement included as Exhibit D an Escrow Agreement, executed by Plaintiffs and Defendant and dated February 23, 2018, pursuant to which the parties to the Escrow Agreement appointed Wells Fargo Bank, N.A., to act as the Escrow Agent. [A copy of the Escrow Agreement is attached hereto as **Exhibit B.**.]

7. Pursuant to the Escrow Agreement, Defendant (as the Purchaser) deposited \$1,000,000 (one million dollars) into the Escrow Account, which funds were to be held by the Escrow Agent for up to one year for the purposes and under the terms set forth therein.

8. The Escrow Account was in large part intended to ensure that the Working Capital calculation, which was completed after the closing, was sufficient and not less than the estimated Working Capital set forth in the Closing Certificate. As stated in Paragraph 1.7(b): “if

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<sup>1</sup> The Asset Purchase Agreement provides that neither of the parties may disclose the terms of the agreement, or any other transaction documents, to third parties without the other party’s

the final Working Capital is less than the estimated Working Capital set forth in the Closing Certificate, then an amount equal to such shortfall . . . will be paid to the Purchaser from the Escrow Account in accordance with the terms of the Escrow Agreement.” However, Paragraph 8.1 of the Escrow Agreement also provided that the Purchaser could deliver a certificate to the Escrow Agent any unpaid indemnification claim or purchase price adjustment claim – but only during a specifically defined “Claim Period.”

9. Specifically, the Escrow Agreement provides in Paragraph 8.1:

The period for making any claims against the Escrow Amount (the “Claim Period”) shall commence on the date hereof and shall terminate on the date that is the twelve (12) months anniversary of the date of this Agreement (or the next succeeding Business Day if such day is not a Business Day) (the “Claims Cutoff Date”). At any time or times during the Claim Period, the Purchaser [Defendant] may from time to time simultaneously deliver to the Escrow Agent and the Seller [Plaintiffs] a certificate in substantially the form of Exhibit A attached to this Agreement (a “Release Certificate”) instructing the Escrow Agent to distribute all or a portion of the Escrow Amount to the Purchaser in satisfaction of any unpaid indemnification or purchase price adjustment claim asserted by the Purchaser pursuant to Section 1.7 or Article 7 of the Purchase Agreement.

10. Pursuant to the Escrow Agreement, the termination date of the Claim Period ended twelve months after the closing, therefore falling on February 23, 2019. However, that date fell on a Saturday and was not a Business Day, under the terms of Paragraph 8.1 of the Escrow Agreement. Therefore, the Claims Cutoff Date actually fell on Monday, February 25, 2019.

11. Article 7 of the Asset Purchase Agreement pertains to Indemnification. In particular, Section 7.3 of the Asset Purchase Agreement states in pertinent part:

No claim may be made seeking indemnification pursuant to Sections 7.1(a) or Section 7.2 for any breach of, or inaccuracy in, any representation or

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written consent. Thus, Plaintiffs will file each of the Exhibits referenced herein pursuant to a motion to seal.

warranty unless a written notice describing such breach or inaccuracy in reasonable detail in light of the circumstances then known to the Indemnified Person is provided to the Indemnifying Party. [Emphasis Added]

12. At no time prior to the Claims Cutoff Date did Defendant provide Plaintiffs or the Escrow Agent with any written notice describing any breach or inaccuracy in any reasonable detail.

**B. Defendant's Improper Claim to Funds Held in Escrow**

13. On February 19, 2019, Defendant sent a "Release Certificate" via electronic mail to the Escrow Agent and the Plaintiffs, in which Defendant purported to assert "an indemnification claim under the Purchase Agreement that exceeds the full Escrow Amount" and attempted to instruct the Escrow Agent that "[t]he Escrow Amount shall be paid in full to the Purchaser." [A copy of Defendant's Release Certificate is attached hereto as **Exhibit C.**]

14. However, at no time prior to the expiration of the Claim Period on February 25, 2019, as defined in the Escrow Agreement, had Defendant ever described to the Plaintiffs any breach or inaccuracy in any representation or warranty in reasonable detail in any written notice that would satisfy the Indemnification requirements of Article 7 of the Asset Purchase Agreement – neither in Defendant's Release Certificate nor in any prior correspondence.

15. Because the Defendant never gave written notice, prior to the Claims Cutoff Date, describing any breach or inaccuracy in reasonable detail to inform Plaintiffs of the basis for its indemnification claim, the Plaintiffs assert that the Release Certificate, which Defendants sent to the Escrow Agent and the Plaintiffs on February 19, 2019, is insufficient and invalid for purposes of stating a claim to any part of the Escrow Amount.

16. Under the Escrow Agreement, Plaintiffs had fifteen (15) calendar days to respond to the Defendant's Release Certificate by filing a Dispute Notice. Prior to the expiration of the

fifteen days, on February 27, 2019, Plaintiffs submitted a Dispute Notice to the Escrow Agent, the Defendant, and its counsel. In the Dispute Notice, Plaintiffs objected to the Release Certificate and its claims, pointing out the Release Certificate was completely devoid of information sufficient to assert a valid indemnification claim to the escrowed funds. [A copy of Plaintiffs' Dispute Notice is attached hereto as **Exhibit D.**]

17. More specifically, in its Dispute Notice, Plaintiffs explained:

Under the Purchase Agreement, "[n]o claim may be made seeking indemnification pursuant to Sections 7.1(a) or Section 7.2(a) for any breach of, or inaccuracy in, any representation or warranty unless a written notice describing such breach or inaccuracy in reasonable detail in light of the circumstances then known to the Indemnified Person is provided to the Indemnifying Party." Because the Purchaser has not given written notice in the Release Certificate describing any breach or inaccuracy in reasonable detail for the Seller, the Seller suggests that the Release Certificate, issued by the Purchaser on February 19, 2019, is insufficient and invalid for purposes of stating a claim to any part of the Escrow Amount. Further, because no sufficient notice has been given within the timeframe stated in the Escrow Agreement, and because the Escrow Release Date has now passed, the Purchaser's Release Certificate does not make a valid claim to the funds held pursuant to the Escrow Agreement. Therefore, there is no justification for the Escrow Agent to delay release of the Escrow Amount to the Sellers. No part of the escrowed funds are subject to any reasonably described and noticed claim to the Sellers, and thus no funds are subject to any properly and/or timely stated unresolved dispute, as defined in the Escrow Agreement.

18. Because the required notice describing Defendant's indemnification allegations was not given within the Claim Period established in the Escrow Agreement, and because the Claims Cutoff Date has now passed, the Defendant failed to state any valid claim to the funds held pursuant to the Escrow Agreement. As a result, in their Dispute Notice to the Escrow Agent, Plaintiffs demanded that "the entire Escrow Amount must be released to the Sellers."

19. Therefore, having received the Plaintiffs' Dispute Notice and because it is now several weeks beyond the expiration of the Claims Period, there is no legitimate basis for the Defendants to cause the Escrow Agent to delay further the release of the Escrow Amount to the

Plaintiffs. No part of the escrowed funds is subject to any reasonably described or timely noticed claim.

20. The \$1,000,000 held by the Escrow Agent should have been paid, in full, to Plaintiffs on February 25, 2019. But upon receiving the Defendant's invalid and wrongful Release Certificate, followed by the Escrow Agent's receipt of the Plaintiff's Dispute Notice, the Escrow Agent concluded in an email that “[t]he entire escrow amount will be held by the Escrow agent in accordance with terms of the agreement until the earlier to occur of the following; (a) the Parties jointly direct the disbursement of all or any portion of the Escrow amount by delivering joint written instructions to the Escrow Agent, or (b) the Escrow Agent receives a certified copy of a final, non-appealable judgement of a court of competent jurisdiction (a “Judgment”), together with an opinion of counsel for the presenting party that such order is final and non-appealable and from a court of competent jurisdiction, with respect to all or any portion of the Disputed Amount.” [A copy of the Escrow Agent's email to the parties is attached hereto as **Exhibit E.**]

21. Each of the conditions precedent to the filing of this action has been satisfied, or has been excused.

**COUNT ONE**  
**DECLARATORY JUDGMENT**

22. Plaintiffs reallege paragraphs 1 through 21 above, as if fully set forth herein.

23. As set forth above, Plaintiffs believe and assert that they are entitled to funds held in escrow, but are in doubt as to their rights based upon the Escrow Agent's refusal to release those funds to Plaintiffs.

24. An actual controversy has arisen between Plaintiffs and Defendant regarding the parties' respective rights to the funds held by the Escrow Agent, pursuant to the terms of the

Escrow Agreement. These parties have an actual, present, adverse and antagonistic interest in the subject matter of this action.

25. There is a bona fide, actual, present practical need for a declaration of the Plaintiff's rights to the amount held by the Escrow Agent.

26. The powers, rights, and privileges of the parties are dependent upon the various contracts and law applicable to the facts presented in connection with this controversy.

27. The relief sought herein is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

WHEREFORE, Plaintiffs respectfully request that this Court enter a declaratory judgment stating that: (a) Plaintiffs are entitled to the full amount held in escrow by the Escrow Agent, Wells Fargo Bank, N.A., along with all investment gains and accrued interest; (b) that Defendant has failed to state a valid and timely indemnification claim under the terms of the Escrow Agreement; (c) that the Escrow Agent should distribute to the Plaintiffs immediately and without delay the full amount held in the Escrow Account, including all investment gains and accrued interest; and (d) that the Defendant shall have no right to any portion of the Escrow Amount that has been properly transferred to the Plaintiffs pursuant to this Court's Order.

**COUNT TWO  
CONVERSION**

28. Plaintiffs reallege paragraphs 1 to 21 as if fully set forth herein.

29. As set forth above, Defendant submitted to the Escrow Agent an insufficient and invalid Release Certificate on February 19, 2019, without any description of the basis for the their claim to an unspecified amount "that exceeds the full Escrow Amount."

30. After negotiating in good faith with Defendant through its counsel, without success at reaching resolution, Plaintiffs again demanded in writing the release of all escrowed funds, including investment earnings, and gave notice of Plaintiffs intent to include a conversion count, if litigation became necessary, in an email sent on April 26, 2019, to those email addresses listed for the Purchaser and its counsel in Paragraph 17 of the Escrow Agreement. However, because none of those who were noticed returned an email to Plaintiffs' counsel to acknowledge receipt of the Plaintiffs' email, Plaintiffs again sent a demand for the release of all escrowed funds and sent it to the parties listed in Paragraph 17 of the Escrow Agreement via Federal Express on April 30, 2019. Therefore, pursuant to Paragraph 17 of the Escrow Agreement, the Defendant and its counsel is deemed to have been given notice of this Conversion Claim on May 1, 2019.

31. Defendant's failure and refusal to return the entire amount of the escrowed funds to the Plaintiffs, plus investment gains and all interest earned on those funds (hereinafter "the escrowed funds"), constitutes conversion.

32. The account holding the escrowed funds is a clearly identifiable sum of specific money.

33. Defendant has failed to timely demonstrate any right to the escrowed funds.

34. Defendant has converted the escrowed funds by wrongfully and intentionally depriving the Plaintiffs of their escrowed funds.

35. Defendant has wrongfully refused to relinquish the escrowed funds to which the Plaintiffs have the right of possession, despite Plaintiffs' written notice and demands.

36. Defendant's conversion of Plaintiffs' escrowed funds has caused and continues to cause the Brogdons to suffer additional damages.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendant in the amount of escrowed funds held by the Escrow Agent, including all investment gains and interests, together with prejudgment and post judgment interest at the maximum rate allowed by law, costs of maintaining the funds in the hands of the Escrow Agent, and any other relief this Court deems just and proper.

DATED this 10th day of May, 2019.

/s/ Pamela C. Marsh  
PAMELA C. MARSH  
Florida Bar No. 057400  
[pmarsh@ausley.com](mailto:pmarsh@ausley.com)  
[sshaffer@ausley.com](mailto:sshaffer@ausley.com)  
DOUGLAS L. KILBY  
Florida Bar No. 0073407  
AUSLEY McMULLEN, P.A.  
[dkilby@ausley.com](mailto:dkilby@ausley.com)  
[mmckenzie@ausley.com](mailto:mmckenzie@ausley.com)  
P.O. Box 391  
Tallahassee, Florida 32302  
(850) 224-9115 Telephone  
(850) 222-7560 Facsimile  
COUNSEL FOR PLAINTIFFS